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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 174

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner

v.

MINNESOTA TEA COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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MINNESOTA TEA COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 83) is reported in 28 B. T. A. 591. The opinion of the Circuit Court of Appeals (R. 112) is reported in 76 F. (2d) 797.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 25, 1935. (R. 124.) The petition for certiorari

was filed June 25, 1935, and granted October 14, 1935. The jurisdiction of this Court is invoked by the petitioner under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether the following transaction constitutes a "reorganization" within the meaning of Sec. 112 (i) (1) (A), Revenue Act of 1928: The respondent (Minnesota Tea Company) transferred all its properties to another corporation (Grand Union Company) in exchange for common stock (voting-trust certificates) of the latter, which the Tea Company continued to hold, plus a sum in cash which the Tea Company immediately distributed to its stockholders, who assumed certain liabilities of the Tea Company.

Whether it is material here that the respondent had previously transferred certain of its assets to a corporation, Peterson Investment Company, for all the Peterson Company stock, and distributed all such stock to its stockholders.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 39-46.

STATEMENT

This is an income tax case involving the question whether gain or loss is recognizable under the following facts, and if so, in what amount. The claimed deficiency is for the taxable period January 1, 1928 to August 24, 1928 (R. 4).

On August 23, 1928, the Minnesota Tea Company transferred all its property to the Grand Union Company in exchange for 18,000 shares of the common stock (voting-trust certificates) of that company, worth $540,000 (R. 94), plus $426,842.52 in cash. The Tea Company thereupon distributed all of the cash to its stockholders, who assumed

liabilities of the Tea Company to the extent of $106,471.73 (R. 12). The Tea Company continued to hold and own the shares of stock in Grand Union, and did not dissolve (R. 12).

In the notice of deficiency, the Commissioner of Internal Revenue held that the transfer of assets to the Grand Union Company constituted a "reorganization," as defined in Sec. 112 (i) (1) (A) of the Revenue Act of 1928, "in that it was the acquisition by one corporation of all of the properties of another corporation" (R. 7), and that the case was therefore governed by Sec. 112 (b) (4) and Sec. 112 (d) of that Act.

As to the distribution of the $426,842.52 of cash, the Commissioner ruled (R. 8), that to the extent of $106,471.73 of liabilities assumed by the stockholders, the Tea Company had not made a "distribution," within the meaning of Sec. 112 (d) of the 1928 Act, and that accordingly, taxable gain was recognizable to the Tea Company to that extent, with a resulting $11,587.64 deficiency in the income taxes of the Tea Company.

When the Tea Company filed its petition (R. 3) to the Board of Tax Appeals, it was not on any issue whether or not there was a reorganization, but on the sole issue whether it had "distributed" all of the cash or only the difference between $426,842.52 and $106,471.73, within the meaning of Sec. 112 (d) of the 1928 Act. The taxpayer took the position that all of the cash had been distributed within the meaning of that section, and that no deficiency was assessable (R. 3). Both parties originally briefed and argued the case solely on this issue (R. 97).

The Board of Tax Appeals (two members dissenting), in spite of the fact that no question of "reorganization" had been raised by the notice of deficiency, nor by the pleadings and arguments of the parties (R. 103), held there was no "reorganization," did not pass on the only question raised in the notice of deficiency, and subsequently entered judg-

ment showing a deficiency of $72,686.90 (R. 95), instead of $11,587.64 as proposed by the Commissioner.

On appeal by the taxpayer to the Circuit Court of Appeals for the Eighth Circuit, that court rejected the contention of the Commissioner that no reorganization occurred, and held that there was a reorganization (1) within the wording of the statute, (2) under the administrative construction of long standing, and (3) within the intent and purpose of Congress (R. 112-123).

The case was reversed and remanded to the Board of Tax Appeals for a decision on the "distribution" point originally raised in the notice of deficiency and which the Board had not decided (R. 124). The petition for certiorari was from this decision.

The respondent's position is that the decision of the Circuit Court of Appeals is correct and that in accordance with that decision the case should be returned to the Board of Tax Appeals for its decision whether the deficiency of $11,587.64, as originally proposed by the Commissioner, is properly assessable.

In his petition for certiorari filed in this Court, the Commissioner raised a question which he had not previously raised, based on the dissenting opinion in the court below—as to whether in view of the earlier organization of the Peterson Investment Company, "substantially all" the properties of the Tea Company were acquired by the Grand Union Company. While opposing such view on the merits, the respondent submits that, since there was no such issue in the case when it was tried, and since the case was tried on a stipulation that all the properties were conveyed to the Grand Union Company (R. 11), this issue is not in the case.

SUMMARY OF ARGUMENT

(1) The transaction comes squarely within the unambiguous terms of the applicable revenue statute. Sec. 112 (b) (4), 1928 Act, provides that no gain or loss shall be recognized if a corporation a party to a reorganization ex-

changes property, in pursuance of a reorganization plan, solely for stock or securities in another corporation a party to the reorganization. Sec. 112 (d) provides that if an exchange would be within the foregoing provision but for the fact that money or other property is received in addition to stock or securities, no gain shall be recognized to the corporation if the money or other property is distributed to the stockholders.[1]

Sec. 112 (i) (1) (A) provides that the term "reorganization" means a merger or consolidation, including the acquisition by one corporation of substantially all the properties of another corporation. The transaction here constituted a reorganization within the express definition, and gain is therefore to be determined under Sec. 112 (b) (4) and Sec. 112 (d), mentioned above.

The fact the Tea Company was not dissolved is not material, for the Act shows that Congress did not intend to require dissolution as a necessary element. Thus, Sec. 112 (d) by covering cases where the corporation does not distribute, recognizes that the transferor corporation may remain in existence. In the same parenthetical phrase of Sec. 112 (i) (1) (A) involved in this case, Congress provided that the acquisition by one corporation of "at least a majority" of the stock of another corporation should constitute a reorganization; dissolution could not have been contemplated for the reason that "at least a majority" of the stock would generally be insufficient to bring about a dissolution.

Since 1922, the administrative practice, as shown by the income tax regulations, has not required dissolution as a necessary element in a reorganization.

(2) Under administrative practice, built up during more than a decade and clearly reflected in the income tax regulations, a transaction of the kind here involved is a reorganization. The regulations recite a specific illustration of

[1] On receiving such distribution the stockholders must pay any tax due from them on that account.

a reorganization which is on all fours with this case. See Reg. 74, Arts. 574-575, not cited or considered by the Board of Tax Appeals in its opinion (R. 83). The Commissioner's finding in the deficiency notice (R. 7) that there is a reorganization here, was issued in conformity with these settled regulations. The administrative practice was, in effect, adopted by Congress when it reenacted the definition of reorganization, without change, in the Revenue Acts of 1924, 1926, and 1928. *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; *Helvering* v. *Bliss*, 293 U. S. 144; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172.

(3) Reports of Congress, quoted herein, show specifically that Congress, in prohibiting the recognition of gain or loss in such situations as this, did so because such prohibition is in the interest of the United States—to remove uncertainty, to avoid interference with business adjustments, to eliminate technical constructions which are economically unsound, to permit business to go forward with adjustments, to attain definiteness and accuracy, and to avoid loss of tax from the allowance of certain losses.

In order to give effect to these purposes, first announced in connection with the 1921 Act, Congress adopted in that Act for the first time a definition of the term "reorganization" which was much broader than ordinary usage of the term. The legislative history, as well as the terms of the law, clearly shows that the definition was intended to be broader than mere merger and consolidation.

Part (A) of the 1928 definition, under which the present transaction is shown to be a reorganization, contains the same language that appears in the 1921 Act, reappearing as Sec. 203 (h) (1) (A), 1924 and 1926 Acts, and Sec. 112 (i) (1) (A), 1928 Act.

In 1924, the definition was expanded to include a situation not covered by the 1921 Act, namely, (Part (B))—a transfer by a corporation of all or a part of its assets to another corporation which is controlled by the transferor or its stockholders. The Committees of Congress re-

ported that the "only change" in the 1921 definition was to "include" within its terms the situation just mentioned.

As the 1921 definition contained no requirement of "control," and as the intention of Congress in 1924 was not to make any change in the definition in that Act, but only to add something to it, it seems indisputable (1) that control is not of any consequence in cases involving Part (A), the "acquisition by one corporation of * * * substantially all the properties of another corporation," and (2) that Part (B) was not meant to limit Part (A), enacted three years earlier.

The same legislative history shows that Parts (A) and (B) of the definition were not meant to be "mutually exclusive," as claimed by the petitioner.

The suggestion of the majority opinion of the Board of Tax Appeals that it is necessary to have a continuance of "essentially the same" interests (R. 86) has no foundation in the decisions it cites, or in Congressional intent. In the Pinellas case (287 U. S. 462), cited by the Board, this Court said "an interest" was necessary. In the Cortland case (60 F. (2d) 937), the other decision relied on by the Board, the Circuit Court said there should be a "continuity" or "continuance" of interest. These requirements are satisfied here, since the stock in Grand Union received by the Tea Company continues its interest and subjects it to the risks of the business.

Clearly, if a small corporation is merged by statutory merger into a large corporation, the small corporation or its stockholders will have only a small proportionate interest in the large corporation, and will acquire an interest in substantially different assets. Congress did not intend that the tax results should be any different when, as in this case, there is a transaction coming within the parenthetical language in Part (A). The terms of the statute and its legislative history show that such was not the intent of Congress.

It is clear from the terms of the statute that Congress was not concerned whether the value of the "other prop-

erty or money" was small or large, as compared with the value of the "stock or securities." The Act makes full provision for the taxation of gain, however large the other property or money, and the disallowance of any loss.

The income tax regulations for many years have contained a specific example in which the amount of the "boot" is greater than the value of the stock. This example also appeared in a statement, released to the public by the Chairman of the Ways and Means Committee, explaining the provisions of the Revenue Bill of 1924.

(4) In the Pinellas case, 287 U. S. 462, where the real issue was whether short-term notes were "securities," this Court corrected the court below (which had indicated that the provisions of the parenthesis in Part (A) were limited to strict mergers and consolidations) and pointed out that the parenthesis expands the meaning beyond merger and consolidation, so as to include cases not within the ordinary meaning, where a continuing interest is maintained. Our position accords with this reasoning, and with the emphasis placed in the Pinellas case on the established view of the tax officers. Here the Tea Company retained stock in Grand Union worth $540,000, and thus continued to hold a definite and vital interest in the affairs of the latter company. A transaction of this type, involving the receipt of stock or securities and a consequent continuing interest, is basically in the nature of a merger or consolidation.

(5) There is no issue in this case as to whether the Tea Company transferred all its properties to the Grand Union Company, because both parties so stipulated (R. 11). Also, the Commissioner's notice of deficiency so held (R. 7).

On the merits, the petitioner's contention in this respect is ill-founded. All that is required in this respect is that, at the time of reorganization, substantially all the properties of the Minnesota Tea Company be acquired by Grand Union. The established view of the Bureau of Internal Revenue is to the effect that if a corporation declares a dividend of part of its assets in advance of transferring its

assets to another corporation in reorganization, in such case the later transfer is of all of the assets. G. C. M. 1345, VI-1, C. B., p. 15. Congress could not have intended to make a sharp difference between (1) the previous transfer of assets by dividend and (2) their transfer to another corporation, followed immediately by the delivery of the stock of that corporation to the stockholders. Furthermore, Congress must have known that in statutory mergers, particularly of national banks, it is often required by the Comptroller of the Currency or by other interests, that the corporation being merged shall first divest itself of ownership of undesirable assets. Such statutory mergers being clearly within the intent of Congress, no reason appears why different rules should have been intended here.

ARGUMENT

Congress expressly prohibited the recognition of gain or loss in certain circumstances—using the words "shall not be recognized." The prohibition of gain and loss in such circumstances was considered to be in the interest of the United States; the present case is precisely within that prohibition, to the extent that the Tea Company distributed the cash to its stockholders, as shown by the terms of the law itself, the settled administrative practice for more than ten years—followed by the Commissioner even in this case—and clear legislative history.

I. The Terms of the Statute.

The intention of Congress, we submit, is properly to be determined first by the language which Congress used—particularly in the very specific tax statute, in which definitions have been made very precise. Compare *Adams Express Company* v. *Kentucky*, 238 U. S. 190, 199; *Crooks* v. *Harrelson*, 282 U. S. 55.

In Sec. 112 (i) (1) of the 1928 Act, Congress defined the term "reorganization" in the following language:

> "(1) *Definition of reorganization.*—As used in this section and sections 113 and 115—(1) the term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected." [1]

Specifically, the transaction here was a reorganization under Sec. 112 (i) (1) (A) because there was "an acquisition by one corporation (the Grand Union Company) . . . of . . . substantially all the properties of another corporation (the Minnesota Tea Company)."

Sec. 112 (b) (4) expressly directs that—

> "No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization." [2]

The transaction here does not come within Sec. 112 (b) (4) because the Tea Company did not receive "solely" stock or securities in the Grand Union Company, in exchange for its properties.

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[1] The definition is thus divided into four major parts, "(A)", "(B)", "(C)", and "(D)".

[2] As has been previously noted, since Grand Union acquired substantially all the properties of Minnesota Tea, there was a reorganization.

Both corporations were parties to the reorganization within the meaning of Sec. 112 (i) (2). See also G. C. M. 3827, VII-2 C. B., p. 114; G. C. M. 7472, IX-1 C. B., p. 184.

However, the statute makes equally direct provision for a case of the kind here involved, in Sec. 112 (d) which provides:

> "If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—
>
> "(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorgnization no gain to the corporation shall be recognized from the exchange, but
>
> "(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed."

As the Tea Company received (1) 18,000 shares of the common stock of Grand Union worth $540,000, and (2) the sum of $426,842.52 in cash, it remains only to determine whether the money was distributed by the Tea Company to its stockholders, pursuant to the plan of reorganization. If the money was so distributed,[1] then no gain is to be recognized to the Tea Company, the purpose of Congress[2] being that an accounting for the cash shall be made by the stockholders and not by the corporation.

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[1] If, however, the money has not been distributed by the Tea Company, or any part of it, gain is to be recognized to the Tea Company in an amount not in excess of the sum of the money which is not so distributed. Thus there arises in this case the question which was originally raised by the Commissioner in his notice of deficiency, namely, whether to the extent that liabilities were assumed by the stockholders, such cash has been distributed by the Tea Company within the meaning of Sec. 112 (d).

[2] See Ways and Means Committee, Rep. No. 179, 68th Cong., 1st Sess., p. 15; Senate Finance Committee, Rep. No. 398, 68th Cong., p. 16.

Dissolution Not Necessary

The Act itself shows that Congress did not intend to require dissolution as a necessary element in a reorganization. Sec. 112 (d) affirmatively recognizes the fact that the transferor corporation need not be dissolved, for it provides that if the transferor corporation elects not to distribute, gain will be recognized "in an amount not in excess of the sum of such money and the fair market value of such other property so received which is not so distributed." The specification of this tax result necessarily implies that the transaction is to be regarded as coming within the definition of reorganization in the case where the transferor corporation is not dissolved, as well as where dissolution does occur. Obviously, a corporation which does not distribute its assets is not dissolving.

Again, in the same parenthetical phrase of Sec. 112 (i) (1) (A) involved in this case, Congress provided that the acquisition by one corporation of "at least a majority" of the stock of another corporation should constitute a reorganization. Dissolution in this type of case could not have been contemplated for the reason that "at least a majority" of the stock would generally be insufficient to bring about a dissolution. The provision in regard to the acquisition of "substantially all the properties" is so closely allied with that in regard to the acquisition of "at least a majority" of the stock that Congress could hardly have intended to require dissolution in the one case without requiring it in the other.

Since 1922, the administrative practice as shown by the income tax regulations has not required dissolution as a necessary element in a reorganization. This precise question as to the necessity for dissolution was considered by the administrative authorities when the regulations under the Revenue Act of 1921 were first promulgated in 1922, more than eleven years prior to the time the Board of Tax Appeals, in the instant case announced its adherence to

the proposition that dissolution was necessary. The 1921 Act was the first act containing the words which appear in parenthesis in Sec. 112 (i) (1) (A) of the 1928 and prior acts. The 1918 law contained no definition, and the regulations thereunder had specifically required dissolution.[1] The administrative authorities, when they came to draw the regulations under the 1921 Act which contained a statutory definition of "reorganization" concluded that dissolution could no longer be required and struck that requirement out of the regulations.[2] Four different revenue acts, those of 1924, 1926, 1928, and 1932, were passed in the following years, making no change in this part of the definition of reorganization, and each successive edition of the regulations continued to omit the requirement of dissolution.[3] (The latest regulations omit such requirement.)[4] The practice of the Bureau of Internal Revenue was continuous and consistent for more than eleven years until the Board of Tax Appeals again raised the question whether a dissolution was necessary.

II. Administrative Practice.

The transaction here was a reorganization not only under the express provisions of the Act, but also under long-established administrative practice as shown in the income tax regulations for more than a decade. When the Commissioner held in his deficiency notice that there was a

[1] Reg. 45, Art. 1567 (promulgated Jan. 28, 1921, under the 1918 Act) mentioned the following as among the permissible types of reorganization: "(b) the sale of its property by B to A and the *dissolution* of B, or (c) the sale of the stock of B to A and the *dissolution* of B."

[2] The first regulations promulgated under the 1921 Act, Reg. 62, Art. 1566(b), approved Feb. 15, 1922, eliminated the requirement of dissolution and mentioned the following as among the permissible types of reorganization: "(2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B."

[3] See Art. 1574 of Reg. 65 (1924 Act) and Reg. 69 (1926 Act); Art. 574 of Reg. 74 (1928 Act) and Reg. 77 (1932 Act).

[4] Reg. 86, Art. 112(g)-3 (1934 Act).

reorganization,[1] he was following this settled administrative practice.

Reorganization cases have constantly been presented to the Bureau in a great variety of circumstances. In the applicable regulations under the Revenue Act of 1928, the Bureau has stated clearly and specifically and at some length certain kinds of transactions which would come within the definition.[2] Thus, in Article 574, Reg. 74, under that Act, it is stated:

> ". . . If two or more corporations reorganize, for example, by . . . (3) the acquisition by the Y Corporation . . . of substantially all the properties of the X Corporation . . . then no taxable income is received from the transaction by the X Corporation . . . if the sole consideration received by the corporations is stock or securities of the Y Corporation. . . ."[3]

Immediately following that article comes Article 575 which applies to the situation where "other property or money" is received together with stock or securities, in which case the regulation provides that:

> "If the other property or money received by the corporation is distributed by it pursuant to the plan of reorganization, no gain to the corporation will be recognized."

---

[1] The Commissioner's language was as follows: "With reference to the transfer of the remaining assets to the Grand Union Company on August 23, 1928, it is to be noted that said assets constituted all the properties then owned by the Minnesota Tea Company. Said transfer, therefore, falls within the definition of a reorganization as set out in Sec. 112 (i) (1) (A) of the 1928 Act in that it was the acquisition by one corporation of all the properties of another corporation. Both the Minnesota Tea Company and the Grand Union Company were parties to said reorganization. General Counsel's Memorandum 3827, Cumulative Bulletin, VII-2, page 114." (R. 7.)

[2] On p. 9 of his petition for certiorari, the Commissioner stated: "It is true that the administrative officers have recognized a transaction such as is here involved as satisfying the statute." In his brief to the court below, the Commissioner made a similar statement and cited the applicable regulations. In his latest brief (p. 29) he takes the position that "the administrative practice, as represented by the Treasury Regulations" has not been "sufficiently specific to support the decision below."

[3] A full text of the applicable regulations appears in the Appendix at pages 43-46, *infra*.

This article then states that if the other property or money is not so distributed, the gain, if any, to the corporation will be recognized—

> "in an amount not in excess of the sum of the money . . . so received which is not distributed . . ."

As regards the transaction here involved, the earlier regulations consistently treated such transactions as reorganizations. See Art. 1574, Reg. 65 (1924 Act); and Art. 1574, Reg. 69 (1926 Act). Congress reenacted the statutory definition of "reorganization" in the Revenue Acts of 1924, 1926, 1928, and 1932 without change.[1]

As pointed out by the court below (R. 115), prior to the decision of the Board of Tax Appeals in the instant case the Board had uniformly held that transactions of the type here involved were reorganizations. See *Tulsa Oxygen Co.*, 18 B. T. A. 1283; *National Pipe and Foundry Co.*, 19 B. T. A. 242, 250; *First National Bank of Champlain*, 21 B. T. A. 415, 422; and *Robert D. Green*, 24 B. T. A. 719, 725.

III. Intent Shown by Legislative History.

The intent and purpose of Congress, as shown in the Committee reports accompanying the various acts, require a holding that this is a "reorganization," as does the spirit of the Act.

The Committee reports which accompanied the various acts show that the general purposes of Congress in enacting the reorganization provisions were—

> (1) To remove impediments to ordinary business transactions, which otherwise would not be consum-

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[1] In *United States* v. *Cerecedo Hermanos y Compañía*, 209 U. S. 337, 339, this Court said:

> "And we have decided that the reenactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction."

See also *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; *Helvering* v. *Bliss*, 293 U. S. 144; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, all decided at the term of Court just ended.

mated on account of the provisions of the tax law heavily taxing gains which were realized only in the form of stock or securities, in "paper" profits so to speak.

(2) To disallow losses which otherwise would have been deductible as a result of such transactions.

(3) To provide for certainty in the rules governing the tax effects of such transactions, certainty being desirable from the standpoint of the taxing authorities as well as that of the taxpayer.

(4) To rely on the "basis" provisions, substituting the cost basis of the property formerly owned as the cost basis on the property newly-acquired (with adjustments for gain or loss recognized on the transaction in question), as a means of safeguarding the revenues and equitably preserving any "loss" position of the taxpayer.

Remove Impediments to Business Transactions

Thus, at the time of enactment of the Revenue Act of 1921, which contained the first definition of reorganization and which contained the same provision as Part (A) of the definition here involved, the Senate Finance Committee reported as follows:

"Under existing law 'when property is exchanged for other property, the property received in exchange shall, for the purpose of determining gain or loss, be treated as the equivalent of cash to the amount of its fair market value, if any. . . .' Probably no part of the present income tax law has been productive of so much uncertainty or has more seriously interfered with necessary business readjustments. . . . .

". . . The proposed act . . . specifies . . . certain classes of exchanges on which no gain or loss is recognized. . . .

"The preceding amendments, if adopted, will, by removing a source of grave uncertainty and by eliminating many technical constructions which are economically unsound, . . . permit business to go forward

with the adjustments required by existing conditions.'"[1]

Again, in reporting the 1924 Revenue Bill, which extended the reorganization provisions to situations not theretofore covered and which provisions were basically the same as those in the 1928 Act here involved, the Senate Finance Committee reported:

> "Paragraph (3) provides that no gain or loss is recognized if a corporation a party to a reorganization exchanges property for stock or securities in another corporation a party to the reorganization. There is no corresponding provision of the existing law, although this paragraph embodies the construction placed by the Treasury Department upon the existing law. The present ruling of the Treasury Department on this question is of doubtful legality and a statutory provision is most necessary.
>
> "Congress has heretofore adopted the policy of exempting from tax the gain from exchanges made in connection with a reorganization in order that ordinary business transactions will not be prevented on account of the provisions of the tax law. If it is necessary for this reason to exempt from tax the gain realized by the stockholders, it is even more necessary to exempt from tax the gain realized by the corporation.'"[2]

Desire for Certainty

In connection with the 1924 bill, the Ways and Means Committee also reported:

> "It appears best to provide generally that gain or loss is recognized from all exchanges and then except specifically and in definite terms those cases of exchange in which it is not desired to tax the gain or allow the loss. This results in definiteness and ac-

[1] Rep. No. 275, 67th Cong., 1st Sess., pp. 11-12. See also Ways and Means Committee Report, Rep. No. 350, 67th Cong., 1st Sess., p. 10.

[2] Rep No. 398, 68th Cong., 1st Sess., pp. 14-15. Similar remarks appear in the Ways and Means Committee Report, Rep. No. 179, 68th Cong., 1st Sess., p. 13.

curacy and enables a taxpayer to determine prior to the consummation of a given transaction the tax liability that will result therefrom." [1]

Again, in regard to the new paragraph (3), mentioned in the foregoing quotation from the Senate report, the Ways and Means Committee said:

"The statute should contain a definite rule on this question." [2]

Purpose to Disallow Paper Losses

As to the desire to disallow losses which otherwise would have been deductible, in reporting the 1921 provisions the Senate Finance Committee said the new provisions would considerably increase the revenue—

"by preventing taxpayers from taking colorable losses in wash sales and other fictitious exchanges" [3]

Basis Provisions

As to the intention of Congress to rely on the basis provisions as a means of safeguarding the revenues and preserving any "loss" position in which the taxpayer might find himself, the 1921 report of the Ways and Means Committee states:

"Proper safeguards are found in subdivisions (e) and (f), which provide that where property is exchanged for other property and no gain or loss is recognized the property received shall be treated as taking the place of the property exchanged, for the purpose of determining gain or loss and for the purpose of deter-

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[1] Rep. No. 179, 68th Cong., 1st Sess., p. 13. See also the views of the Democratic Minority members of the Committee, at p. 77 of this report; the minority said,—"We believe the law should be made definite and specific so every taxpayer will know under the law his rights and will not be required to have his tax adjudicated upon the discretion of the Treasury officials." See also Senate Finance Committee, Rep. No. 398, 68th Cong., 1st Sess., p. 14.

[2] *Ibid*, at p. 13.

[3] Rep. No. 275, 67th Cong., 1st Sess., pp. 11-12. See also Ways and Means Committee, Rep. No. 350, 67th Cong., 1st Sess., p. 10.

mining certain important deductions, such as those for depreciation."[1]

Again, in 1924, the Ways and Means Committee reported:

"The provisions of Sec. 203 of the bill that no gain or loss is recognized from certain exchanges do not grant an exemption and are not so intended.[2] These provisions are based upon the theory that *the types of exchanges specified* in Sec. 203 *are* merely *changes in form and not in substance,*[3] and consequently should not be considered as effecting a realization of income at the time of the exchange. In other words, these provisions result not in an exemption from tax but in a postponement of tax until the gain is realized by a pure sale or by such an exchange as amounts to a pure sale. It follows, therefore, that in the case of such an exchange the property received should be considered as taking the place of the property exchanged. If in connection with the exchange money is received which is not taxed, obviously the basis at which the old property is carried on the books of the taxpayer should be reduced to that extent, since the taxpayer has in part

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[1] Rep. No. 350, 67th Cong., 1st Sess., p. 10. See also Senate Finance Committee, Rep. No. 275, 67th Cong., 1st Sess., p. 12.

[2] On p. 9 of his brief, the Commissioner argues that the reorganization provisions are "exemptions" and should be strictly construed. On p. 32 of the brief, the argument is continued with the suggestion that the provisions constitute a "Congressional bounty." On p. 33, it is argued, in effect, that the provisions should be "meticulously" limited in their application.

The exemption argument is, of course, answered by the language of the Committee on Ways and Means. Also, as the provisions have to do with the recognition of loss as well as gain, it is evident that if they are interpreted narrowly in a case involving gain the Government is adversely affected in other cases involving losses.

[3] When the language which we have italicized is construed in the light of the provisions which it explains, it shows that the expression "changes in form and not in substance" is used in a broad and not a narrow sense. Where a small corporation is merged into a larger corporation, the stock of the latter corporation received by the old owners represents an interest in entirely new assets. Yet this report says that this is a change in form and not in substance. So with all the other exchanges specified in Sec. 203, (Sec. 112, 1928 Act), which in the view of Congress are to be regarded *per se* as changes of form and not in substance. The broad use of the "form and substance" idea which enabled Congress to say that these are changes in form and not in substance involves the fact, common to all these circumstances, that the taxpayer still has only paper profits—except to the extent that "money or other property" has been received. To that extent provision is made for the taxation of gain.

received a return of capital. But if money is received in connection with the exchange and the money is taxed, it is equally obvious that the basis of the old property should not be affected.'"

In order to give effect to these purposes, first announced in connection with the 1921 Act and clearly shown in the Committee reports from which we have quoted, Congress in the Revenue Act of 1921, Sec. 202 (c), the first act to contain a definition of "reorganization," adopted a special definition of that term[2] which was much broader than ordinary usage of the term. The language of the 1928 Act under which the present transaction is shown to be a reorganization is the same language that appears in the 1921 Act, reappearing as Part (A) of the definition in the 1924, 1926, and 1928 Acts.

This purpose was clearly apparent from the very beginning. The 1921 bill, as reported by the Ways and Means Committee and as passed by the House, provided that the term should include—

"a merger, consolidation (however effected)" etc.[3]

When the bill reached the Senate, it was amended so as to make the definition even broader, by providing that reorganization should include not only "merger" and "consolidation" but also—

"the acquisition by one corporation of at least a majority of the voting stock and at least a majority of

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[1] Rep. No. 179, 68th Cong., 1st Sess., pp. 16-17. See also Senate Finance Committee, Rep. No. 398, 68th Cong., 1st Sess., pp. 17-18.

[2] Sec. 202 (c), 1921 Act, provided that "the word 'reorganization,' as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation (however effected)."

[3] H. R. 8245, 67th Cong., 1st Sess.

> the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation."[1]

The Conference Committee reported that the Senate amendment "adds" to the definition in the House bill the cases of majority stock acquisitions and acquisitions of properties.[2] It is clear from the legislative history of the definition that, as held by this Court in *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462, the definition was intended to be broader than mere merger and consolidation.

When the 1924 Act was adopted the definition of reorganization was expanded to include a situation not covered by the 1921 Act. This was accomplished by adding to the definition a new provision, Part (B), which read as follows:

> "The term 'reorganization' means . . . (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred."[3]

The purpose of Congress in thus expanding the definition was stated at the time by the Ways and Means Committee which reported as follows:

> "Subdivision (h) (1) contains a definition of reorganization which corresponds to the definition contained in Sec. 202 (c) (2) of the existing law. The only *change* in the definition is to *include* within its terms the case of a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders, or both, are in control of the corporation to which the assets are transferred. This is a common type of reorganization,

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[1] See Conference Report, Rep. No. 486, 67th Cong., 1st Sess., pp. 17-18. See also G. C. M. 3535, IX-2 C. B., p. 127.

[2] Rep. No. 486, 67th Cong., 1st Sess., p. 17 (Amendment No. 47).

[3] Sec. 203(h) (1) (B), 1924 Act, which is the same as Sec. 112 (i) (1) (B) of the 1928 Act here involved.

and clearly should be *included* within the reorganization provisions of the statute."[1]

As the 1921 Act contained no requirement whatever for "control", and as the intention of Congress was not to make any change in the definition in that Act, but only to add something to it, it seems indisputable that control is not of any consequence in cases involving the "acquisition by one corporation of . . . substantially all the properties of another corporation," such as is the case here.[2]

The same legislative history shows the error in the Commissioner's argument (p. 15 of his brief) that Parts (A) and (B) of the definition are "mutually exclusive." The new provision, incorporated for the first time in the 1924 Act, could not exclude something which was in the mind of Congress when it passed the 1921 Act, when the reports clearly show that Congress did not desire to change the provisions of the 1921 Act, but only to add to them a situation not theretofore covered.[3]

There is further legislative history and consistent administrative construction showing that Parts (A) and (B) were not meant to be mutually exclusive. These parts of the definition, as well as all the other parts, are joined by the word "or" which means "and/or". In reporting the

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[1] Rep. No. 179, 68th Cong., 1st Sess., p. 16; see also Senate Finance Committee, Rep. No. 398, 68th Cong., 1st Sess., p. 17; Magill, "Notes on the Revenue Act of 1924", 24 Col. L. Rev. 836, 845.

[2] The Commissioner in his brief (p. 31), seems to admit that control is not necessary. See, in accord, G. C. M. 1753, VI-1 C. B., p. 138.

[3] The majority opinion of the Board indicates that it did not have before it all the legislative history, particularly the fact that Part (A) had been expressly enacted three years before Part (B) of the definition (mentioning control) was added in 1924. Thus, the Board said:

> "An examination of the history of these provisions seems to indicate that there was no deliberate design to differentiate between the phraseology of (A) and (B), but only to bring together, within the definition of reorganization, *language which had already been used in separate parts of the statutory scheme;*" (R. 86.)

When Part (B) was enacted in 1924, it introduced language that had not been in the statutory scheme when Part (A) had been enacted in 1921. This misunderstanding may account for the Board's erroneously concluding that Part (B) limits Part (A).

1924 bill, the Ways and Means Committee made this meaning clear. Said the Committee:

> "It should be noted that in paragraphs (b) and (c) of this section, as well as in other provisions of the proposed bill, the conjunction 'or' is used to denote both the conjunctive and the disjunctive."[1]

The applicable income tax regulations also provide:

> "As used in Sec. 112, as well as in other provisions of the Act, the conjunction 'or' is used to denote both the conjunctive and the disjunctive."[2]

Any other interpretation cannot possibly be supported by an analysis of the language of the definition. Thus, if Corporations X and Y are owned by the same stockholders and Corporation X is taken over by Corporation Y in a statutory merger, there is clearly (A) a merger and at the same time (B) a transfer by X of its assets to a controlled corporation. It is even possible to assume a case which falls within three different parts of the definition. Thus, in some circumstances a statutory merger of one corporation into another corporation, controlled by the same stockholders, would be not only (A) a merger and (B) a transfer of assets to a controlled corporation, but also (D) a mere change in the form of organization.

The suggestion of the majority opinion of the Board that it is necessary to have a continuance of "essentially the same" interests (R. 86) has no foundation in the decisions it cites or in Congressional intention. In the Pinellas case, cited by the Board, this Court said:

> " . . . the seller must acquire *an interest* in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase money notes." 287 U. S. 462, 470.

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[1] Rep. No. 179, 68th Cong., 1st Sess., p. 14.

[2] Reg. No. 74, Art. 577 (1928 Act). See also Reg. 65, Art. 1577 (1924 Act) and Reg. 69, Art. 1577 (1926 Act).

A careful examination of the opinion of the Circuit Court in the Cortland case, the other decision relied on by the Board, fails to disclose that the court ever used the phrase "essentially the same" interests. All that court held was that there should be a "continuity" or "continuance" of interest, the court using the following language:

> "When describing the kind of change in corporate structure that permits exemption from these taxes, Sec. 203 (1926 Act) does not disregard the necessity of *continuity of interests* under modified corporate forms."
>
> "Each transaction presupposed a *continuance of interest* on the part of the transferor in the properties transferred." 60 F. (2d) 937, 940.

This requirement is satisfied here, since the Tea Company received stock in Grand Union.

It is quite evident from the terms of the entire definition of "reorganization" as well as from its legislative history that situations in which the taxpayer's capital investment remains "substantially the same" or where the change is only "formal," are merely one type of the several types contemplated by the law.[1]

Clearly, if a small corporation is merged by statutory merger into a large corporation, the small corporation or its stockholders will have only a small proportionate interest in the corporation which takes over the assets. Moreover, after the merger the interest of the small corporation or its stockholders will not be in the same assets but in a larger group of assets, of which the assets formerly owned by the small corporation will constitute only a small part. Since this is frequently the result in a statutory merger,

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[1] On page 29 of his brief, the Commissioner states: "The regulations . . . emphasize that the statute is dealing with corporate reorganizations which result only in a change of form which does not substantially affect the property interests of either the shareholders or the corporations." A careful search by us of Reg. 74, promulgated under the 1928 Act and applicable to this case, fails to disclose any statement to that effect.

there is no reason why the tax results should be any different when, as in this case, the larger corporation acquires the assets of the smaller corporation in a transaction coming within the parenthetical language of Sec. 112 (i) (1) (A) of the Act. The terms of the Act and its legislative history show that such was not the intent of Congress.[1]

It is also clear from an examination of the exchange provisions, Sec. 112 (b) (4) and Sec. 112 (d) in particular, that the only continuity of interest which Congress intended was that the transferor corporation or its stockholders should receive some "stock or securities." When stock or securities are received, the capital investment of the taxpayer is to that extent continued in the other corporation and *subjected to the risks of the business.*[2]

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[1] In fact, Congress has definitely provided that the transferee corporation in such cases shall take a new basis for the assets in question, that is, "cost" to it as distinguished from the basis which the transferor corporation had. The provision, Sec. 113 (a) (7), 1928 Act (reprinted at p. 42, *infra*) requiring the transferee corporation to use the old basis applies *only* when an interest or control of 80 per centum or more remains in the old owners. There is no doubt whatever as to this result. In addition to Sec. 113 (a) (7), see Reg. 74, Art. 599 (which provides "It should be noted that property may be acquired in connection with a reorganization without the provisions of Sec. 113 (a) (7) . . . . being applicable, because of the fact that an interest or control of 80 per cent or more does not remain in the same persons"). See also Ways and Means Committee, Rep. No. 179, 68th Cong., 1st Sess., p. 54; Senate Finance Committee, Rep. No. 398, 68th Cong., 1st Sess., p. 18; *Metropolitan Ice Co.*, 32 B. T. A. .... (No. 81, Apr. 10, 1935); and *Northwest Bancorporation*, 33 B. T. A. .... (No. 27, Oct. 10, 1935).

Thus, the argument which the Commissioner makes on pp. 19-20 of his brief, that the transferee is always required to assume the basis of the transferor, is founded on a misunderstanding of the law and the regulations.

[2] As a substantial amount of stock was received by the Tea Company in the instant case, it is unnecessary to decide whether securities alone would have given the Company a "continuing interest." Clearly, stock in the transferee corporation does give the transferor such an interest. In passing, however, it may be noted that the receipt of securities alone (bonds, for example) would have been sufficient, for in reporting the 1924 bill, the House Ways and Means Committee said: "The provisions of paragraph (2) are complied with if 'stock and securities' are received in exchange as well as if 'stock or securities' are received." Rep. No. 179, 68th Cong., 1st Sess., p. 14. The regulations for many years have contained similar language. See Reg. 65, Art. 1577 (1924 Act); Reg. 69, Art. 1577 (1926 Act); Reg. 74, Art. 577 (1928 Act); Reg. 77, Art. 577 (1932 Act); and Reg. 86, Art. 112 (g)-2 (1934 Act). It thus appears that such cases at *Hay Foundry & Iron Works*, 33 B. T. A. .... (No. 22, Sept. 30, 1935), and the dictum in *Worcester Salt Co.* v. *Commissioner*, 75 F. (2d) 251, (C. C. A. 2nd), holding that while bonds are "securities," they do not give "continuity of interest," are wrong.

Congress did not intend to confine the nonrecognition of gain or loss to cases where "stock or securities" are the sole consideration, for it made full provision in Sec. 112 (c) and Sec. 112 (d), for the taxation of gain where "other property or money" is received. To the extent that "other property or money" is received, the capital investment is not continued. To that extent the original investment is liquidated; provision is made for the taxation of any gain (in the instant case either to the Tea Company or its stockholders); provision is also made, in Sec. 112 (e), for the disallowance of any loss in such cases.

It is also clear that Congress was not concerned whether the value of the "other property or money" was small or large, as compared with the value of the "stock or securities." In cases of gain, the Government fares better if the larger part of the consideration consists of other property or money, for under the law the amount of recognizable and taxable gain increases as the other property or money increases. On the other hand, Sec. 112 (e) arbitrarily forbids the recognition of a loss in any such case. There is thus no occasion for the "close scrutiny" suggested on page 20 of the Commissioner's brief.

On page 20 of his brief, without referring to any legislative history specially bearing on the matter, the Commissioner argues that "Congress expected it (the other property or money) to be comparatively insignificant in amount."[1] We submit that the answer to this argument is found in the very clear provisions of Sec. 112 (c), Sec. 112 (d) and Sec. 112 (e). These sections of the law make full provision for the taxation of any gain and the disallow-

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[1] If valid, the Commissioner's argument would have to include not only reorganization cases but also all the other types of exchanges specified in Sec. 112. Thus, a farmer could not exchange his farm ("productive use or investment" property; Sec. 112 (b) (1)) for another farm plus any substantial sum of cash, without having the full amount of any gain recognized to him.

ance of any loss,[1] whether the amount of the other property or money be small or large. Had Congress intended any limitation upon the application of these provisions depending upon the amounts of other property or money received on the exchange it surely would have so stated in the statute.

There is, moreover, specific indication, aside from the language of the statute, that the relative size of the "boot" is immaterial. In January, 1924, Chairman Green of the House Ways and Means Committee released to the public a "Statement of the Changes in the Revenue Act of 1921 by the Treasury Department and the Rreasons Therefor,"[2] prepared for the use of the Ways and Means Committee by A. W. Gregg, at that time Special Assistant to the Secretary of the Treasury and later General Counsel of the Bureau of Internal Revenue. In explaining the "basis" provisions of the 1924 bill, later enacted as a part of the 1924 law, the Statement set forth the following "example" among others:

> "Example 4.—A purchased a share of stock in the X Company for $100. The X Company is reorganized into the Y Company and A receives, in place of his stock in the X Company, a share of stock in the Y Company, worth $50, a Liberty bond worth $40, and $10 in cash. . . ."

The Statement then proceeded to explain how the basis for the Y Company stock and the Liberty bond was to be determined. The important thing for the purpose here is that the "other property or money" was not "insignifi-

[1] The Commissioner's argument, if valid, would result in the virtual nullification of Sec. 112 (c) which inhibits the recognition of loss where "other property or money" is received. Thus, if in a given case the other property or money were not insignificant in amount, the taxpayer would, if the Commissioner's argument is valid, be entitled to deduct in full his loss on the transaction.

[2] The Statement was printed in full in the New York Times for January 5, 1924.

cant" but equal in value to the share of the Y Company stock.

The Statement also contained the following additional example:

> "Example 5.—A purchased a share of stock in the X Company for $100. The X Company is reorganized into the Y Company, and A receives, in place of his share of stock, a share of stock in the Y Company, worth $60, a Liberty bond worth $50, and $20 in cash. Under Sec. 203 (d), A realized a gain of $30 from the exchange."

Here the total value of the other property or money was $70.00, as compared with a value of $60.00 for the stock.

Example 5, which we have quoted from the Statement prepared by Mr. Gregg and released to the public by Chairman Green, was incorporated almost verbatim in Art. 1596 of Reg. 65, promulgated under the 1924 Act, and has reappeared in each successive draft of the regulations, including those promulgated under the Revenue Act of 1934.[1]

IV. The Pinellas Case.

In *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462, the facts were that one corporation transferred its assets to another corporation, in return for cash and short-term purchase money notes. The real issue was whether the notes were "securities," and it would appear that the pith of this Court's decision is found in the following sentences from the opinion:

> "These notes—mere evidence of obligation to pay the purchase price—were not securities within the intendment of the act and were properly regarded as the equivalent of cash."
>
> "Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs

[1] See Reg. 86, Art. 113(a)(6)-1 (1934 Act); Reg. 77, Art. 597 (1932 Act); Reg. 74, Art. 597 (1928 Act); Reg. 69, Art. 1596 (1926 Act); and Reg. 65, Art. 1596 (1924 Act).

of the purchasing company more definite than that incident to ownership of its short-term purchase money notes." (287 U. S. 462, 468, 470.)

However, as the court below had, in addition to holding that the notes were not securities, indicated that Part (A) of the reorganization definition was confined to technical mergers and consolidations,[1] this Court apparently felt that the situation required it to go further and to correct the lower court as to the narrow interpretation which the lower court had given to the definition. This Court said:

> "The court below held that the facts disclosed failed to show a 'reorganization' within the statutory definition. And, in the circumstances, we approve that conclusion. But the construction which the court seems to have placed upon clause (A) . . . we think is too narrow. It conflicts with established practice of the tax officers and if passed without comment, may produce perplexity."
>
> " . . . The words within the parenthesis may not be disregarded. They expand the meaning of 'merger' or 'consolidation' so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation. But the mere purchase for money of the assets of one company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase money notes. This general view is adopted and well

[1] The lower court said: "It must be assumed that . . . Congress intended to use the words 'merger' and 'consolidation' in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point." (57 F. (2d) 188, 190.)

sustained in Cortland Specialty Co. v. Commissioner of Internal Revenue, C. C. A. (2d), 60 F. (2d) 937, 939, 940. It harmonizes with the underlying purpose of the provisions in respect of exemptions and gives some effect to all the words employed." (287 U. S., at pp. 469-470.)

Our position in this case accords with the opinion of this Court in the Pinellas case, in that—

(1) The Minnesota Tea Company, by reason of its ownership of the 18,000 shares of stock worth $540,000, in the Grand Union Company, had a definite and vital interest in the affairs of the latter company;

(2) There was a "merger" within the meaning of that term as "expanded" by the words within the parenthesis, in that the Grand Union Company acquired all the properties of the Tea Company and gave in exchange therefor a consideration consisting, in substantial part, of shares of its own stock;

(3) A transaction of this type, involving the receipt of "stock or securities" by the transferor or its stockholders is basically in the nature of a merger or consolidation, for the old owners maintain a continuing interest and are subjected to the risks of the business. Such formalities as dissolution of the transferor have no bearing on the basic similarity in which Congress was interested, namely, the receipt of stock or securities by the transferor.

(4) Our position is in accord with the established practice of the tax officers.

The Pinellas decision, correcting a narrow view of the court below in that case, cannot be authority for going back in this case to the same narrow view.

V. Miscellaneous Government Arguments.

Plan of Reorganization

On pages 23-26 of his brief, the Commissioner makes an argument which he has not heretofore advanced in this

case. He argues "there was no plan of reorganization," that the record is bare of any evidence that the petitioner and the Grand Union Company "desired to effect a reorganization," and that the proceedings were "couched in terms of purchase and sale."

If there was a reorganization in this case as a matter of law, there was a "plan." The transfer of the properties to Grand Union, the receipt by the Tea Company of the Grand Union stock and the cash, and the distribution of the cash to the Tea Company stockholders, was all done pursuant to a plan (R. 11) involving a written contract and various corporate resolutions. These resolutions used the term "reorganization" in describing the transaction (R. 13, 22).

The Commissioner's brief attaches great significance to the use by the parties of the terms "sale" and "purchase" in various instances. Obviously, a reorganization cannot be converted into a sale by merely calling it a sale. Nor can a sale be made into a reorganization by calling it a reorganization. The important thing is what the parties actually do; if they do things which the law directs to be treated as a reorganization, the transaction is a reorganization. If they do not, there is no reorganization, no matter what they call it.

The Commissioner's position here is in sharp contrast with administrative practice. The income tax regulations for many years made no such distinction in terminology and consistently described reorganization transactions as "sales"[1]; the Committees of Congress have also described them as "sales"[2]; and this Court in the Pinellas case[3] spoke of the "seller" and the "purchasing company" in connection with reorganization transactions.

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[1] See p. 13, notes 1 and 2, *supra*, and Reg. 45, Art. 1567 (1918 Act); Reg. 62, Art. 1566 (1921 Act); Reg. 65, Art. 1574 (1924 Act); Reg. 69, Art. 1574 (1926 Act).

[2] Ways and Means Committee, Rep. No. 179, 68th Cong., 1st Sess. (1924 Act), p. 15, used "sale" and "selling corporation" in describing reorganizations of the precise kind involved in the instant case. See also Senate Finance Committee, Rep. No. 398, 68th Cong., 1st Sess. (1924 Act), p. 16.

[3] 287 U. S. 462, 470.

Voting-Trust Certificates

On page 26 of his brief, the Commissioner makes another argument which he has not heretofore advanced in this case. He argues that while the common stock voting-trust certificates gave the respondent a "proprietary interest," the respondent "had no voice in the management of the business," and that it retained only the right to "share in the earnings."

It is, of course, well-known that voting-trust certificates evidence the real and beneficial ownership of the stock which is in trust.[1] As much seems to be admitted by the Commissioner when he speaks of the certificates as giving the respondent a proprietary interest.

As we have heretofore shown in this brief,[2] it was the intention of Congress that either "stock" or "securities" could be received without any recognition of gain or loss. An owner of "securities" does not ordinarily have even a proprietary interest. He does not ordinarily share in the corporate profits as such. If such an interest is sufficient, as the legislative history and the administrative practice show it to be, how much more so is ownership of certificates of the kind here involved.

Voting-trust certificates for the common stock of Grand Union Company were listed on the New York Stock Exchange.[3] They were the equivalent of common stock, which may be either voting or non-voting. The Tea Company by reason of owning them had a continuing interest in the business of the Grand Union Company.

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[1] Compare *Margaret E. Kidder*, 30 B. T. A. 59, where it was held that a sale of common stock voting-trust certificates, at less than cost, and the purchase of an equal number of shares of common stock on the same day was a "wash sale" and did not give rise to a deductible loss. Compare also G. C. M. 2177, VI-2 C. B., pp. 112, 114.

[2] See p. 25, note 2, *supra*.

[3] See p. 20 of the Record in the Peterson Cases, Nos. 175-176, Oct. Term, 1935.

Dividends Taxable When Distributed

On pages 22-23 of his brief, the Commissioner argues that Congress intended that transferor corporations should be dissolved, for the reason that if the transferor is not dissolved, the dividends which it receives on the stock of the transferee will be "permanently" exempted from tax. As heretofore shown, the Act itself and the long-established administrative construction show that dissolution is not intended to be essential.[1] Furthermore, the dividends in question are taxable to the stockholders of the Tea Company when distributed, and Sec. 104 of the 1928 Act imposes a heavy penalty of 50 per centum on any corporation which permits its income to be accumulated for the purpose of preventing the imposition of the surtax upon its stockholders.[2]

Peterson Investment Company

On July 14, 1928, prior to any ratification by its stockholders of the contract to transfer assets to the Grand Union Company (R. 26) the Minnesota Tea Company transferred a portion of its assets not essential to its main business (which was "that of selling teas, coffees, and groceries at retail" (R. 10) to the Peterson Investment Company,[3] in exchange for all of the capital stock of the latter corporation, which stock was distributed to the stockholders of the Tea Company in the manner specified by Sec. 112 (i) (1) (B) and Sec. 112 (g) of the Revenue Act of 1928.

The point now raised[4] in the Commissioner's brief (p.

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[1] See pp. 12-13, *supra*.

[2] See also Sec. 104, 1932 Act; Sec. 220, 1926 and 1934 Acts. Compare Sec. 102, 1934 Act, in which the penalty is 25 per cent and 35 per cent, depending upon the amount of income.

[3] These assets comprised only 11.3 per cent of the assets of the Tea Company. See R. 9, Peterson Cases, Nos. 175-176, Oct. Term, 1935.

[4] At no time when the case was pending before the Board or the court below did the Commissioner allege (either by filing a pleading or by suggestion in argument) that the transactions herein were other than *bona fide* or that the transfer to the Peterson Investment Company and the transfer to the Grand Union Company were in fact only one transaction, or that the parties had purposes other than they actually carried out. Thus, these fact issues are not in the case.

33) to the effect that, because of such transfer, the Tea Company did not transfer substantially all of its properties to Grand Union, is contrary to the stipulated fact that—

> "On August 23, 1928, petitioner transferred all of its assets to Grand Union Company." (R. 11.)

See also the stipulation in the Peterson cases (Nos. 175-176, Oct. Term, 1935; R. 18) in which the Commissioner stipulated that—

> "The said Minnesota Tea Company transferred all of its assets to Grand Union Company."[1]

The majority opinion of the court below held that the transfer to the Peterson Investment Company was "not of vital importance in the present controversy" (R. 112) and proceeded to decide the question before it, whether the transfer by the Tea Company of substantially all its properties to the Grand Union Company constituted a reorganization. The point on which the Commissioner now relies was suggested for the first time by the dissenting opinion. (R. 119.)

Our position is that Congress did not intend that a transfer of assets such as was made to the Peterson Investment

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[1] While opposing on its merits the view raised by the Commissioner, the respondent submits that the issue is not in the case. The Commissioner's previous position, in addition to his stipulation as to the facts, is shown in the following parts of the Record:

(1) In the notice of deficiency, the Commissioner expressly ruled (a) that the transfer to the Peterson Investment Company was "clearly" a nontaxable reorganization within the meaning of Sec. 112(i)(1)(B), and allocated the basis which the stockholders had for their stock in the Tea Company between the Tea stock and the Peterson stock in proportion to their fair market values, and (b) that the transfer to the Grand Union "falls within the definition of a reorganization as set out in Sec. 112(i)(1)(A) of the 1928 Act in that it was the acquisition by one corporation of all the properties of another corporation." The Commissioner cited "General Counsel's Memorandum 3827, Cumulative Bulletin, VII-2, page 114." (R. 7.)

(2) When the Board member indicated his inclination to hold there was no reorganization, the Commissioner filed a memorandum brief conceding "that the General Counsel still considered this nontaxable (*sic.*) reorganization." (R. 105.)

(3) In his motion for rehearing, filed for the purpose of claiming an increased deficiency, the Commissioner again indicated his appreciation that the case involved "the acquisition by one corporation of substantially all of the properties of another corporation." (R. 91.)

Company should affect the application of Sec. 112 (i) (1) (A) of the Act, and that this is supported by the administrative practice of the Bureau of Internal Revenue.

(1) Thus, the Bureau of Internal Revenue holds that a corporation may declare a dividend of part of its assets to its stockholders in advance of transferring all of its assets to another corporation in reorganization. See G. C. M. 1345, VI-1 C. B., p. 15, issued in 1927.[1]

If it be true that a previous dividend does not render impossible a subsequent transfer of all the assets, the same must be true where the first transaction takes the form of a transfer to a corporation followed by a distribution of the stock to the stockholders. It is often a physical impossibility to transfer assets to stockholders by way of a dividend, for example, where as here, the assets consist of real estate. (R. 27.) Ordinary and normal business practice frequently points to the desirability of transferring such assets to a corporation and distributing the stock of the corporation. There are other business advantages in incorporation; for example, if real estate is distributed in undivided interests to stockholders, there may be difficulties later as to the title in the event one of the owners dies or the interest of an owner is subjected to attachment or sold under execution or a judgment lien is filed on such interest.

(2) Congress obviously intended that the tax results in this respect should be the same in reorganizations involving the acquisition by one corporation of "substantially all" the properties of another corporation as in reorganizations by way of *statutory* merger or consolidation. As to the latter, it is frequently the case that, prior to the statutory merger or consolidation, assets not apt to the statu-

[1] The facts were that the M Company, after a dividend distribution to its stockholders transferred its remaining assets to the S Company for stock in that company, which it distributed to its stockholders. "Since the actual transfer of the properties to the S Company," said the General Counsel, "took place after the distribution by the M Company of . . . cash . . . and . . . stock in the Q Company it constituted a transfer of substantially all the assets of one corporation to another, and, therefore, constituted a reorganization." Compare I. T. 1850, II-2 C. B., p. 8.

tory merger or consolidation are distributed as a dividend or transferred to a separate corporation. Such transfers are frequently made prior to the merger or consolidation of national banks.[1] As is generally known it is the practice of the Comptroller of the Currency to require that a bank being merged or consolidated into another banking corporation shall first divest itself of the ownership of undesirable assets. Obviously, in such a case there is a statutory "merger" within the meaning of the tax law. We submit that such is equally true in other cases involving reorganizations such as those within the parenthetical language in Sec. 112 (i) (1) (A). There is no logical reason why Congress would have desired to make a rule applicable to statutory mergers and consolidations and then outlaw similar transactions otherwise falling within the expanded meaning of "merger and consolidation."

(3) The only practicable rule, and, indeed, the only rule which works consistently as to statutory mergers and consolidations and the expanded meanings of those terms, and which results in the certainty and the definiteness which Congress intended in the enactment of the reorganization provisions,[2]—is the one which has been adopted by the Bureau of Internal Revenue in G. C. M. 1345 already cited and which was followed by the Commissioner in his notice of deficiency in this case, namely, that in determining whether "substantially all" the properties of one corporation have been acquired by another corporation, one looks at the date of the actual transfer of ownership of the properties in question. If any prior date is to be taken as determinative, the question inevitably arises whether it is to be a date one week previous, one month, or one year, or five years. Any such rule would be difficult in administrative application as well as outside the Congressional intent.

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[1] See, for example, *Walter Hopkins*, 27 B. T. A. 1331, 1333-1334; *Nat'l Bank of the Republic of Chicago*, 31 B. T. A. 680, 681; I. T. 1850, II-2 C. B., p. 8.

[2] See p. 17, *supra*.

(4) The facts call for no application of the principles announced by this Court in *Gregory* v. *Helvering*, 293 U. S. 465. In the Gregory case, the corporation had an ephemeral existence, having been organized and dissolved, all within six days; all for the sole purpose of procuring a transfer of properties to Mrs. Gregory in order that she might sell them for her individual profit. As this Court said, "It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function," and "When that limited function had been exercised, it immediately was put to death."

Here the Peterson Investment Company continued in possession and ownership of the assets. The Commissioner, as directed by Sec. 113(a)(9) of the Act and Art. 600 of Reg. 74, allocated the stockholders' basis for their stock between the Peterson stock and the Tea Company stock in proportion to their fair market values. (R. 7.) There is nothing in the record which even tends to indicate that the Peterson Company was not organized in good faith to hold and deal in real estate and other investments as an active business. For aught that appears, it is today engaged in that business.

That the transaction might or could have been accomplished differently does not mean that it was a sham or a mere contrivance to avoid taxes. As aptly said by the Circuit Court of Appeals in the Gregory case, "the underlying presupposition is plain that the readjustment shall be undertaken for reasons germane to the conduct of the venture in hand, not as an ephemeral incident, egregious to its prosecution." (69 F. (2d) 809, 811.) Convenience and expediency[1] consistent with a lawful purpose are entirely suf-

[1] When the assets of Minnesota Tea Company were transferred to Grand Union Company, there were also transferred to it "the good will and all trade-marks and trade names and the right to use the name 'Minnesota Tea Company.'" (R. 29.) Under these circumstances, it would have been wholly inexpedient and a cause of confusion, if Minnesota Tea Company should continue to hold and deal in real estate and other investments, while the Grand

ficient to meet the requirements of the reorganization provisions.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed.

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November, 1935.

Union Company was operating its business under the same name. Furthermore, if it had changed its name, the name Minnesota Tea Company would have been no longer exclusive to it, and the purchase by Grand Union of the right to use that name (a right which Grand Union apparently considered of great value) would have meant nothing.

APPENDIX

Revenue Act of 1928.

Sec. 112. Recognition of Gain or Loss.

(a) General rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges solely in kind.—

(1) PROPERTY HELD FOR PRODUCTIVE USE OR INVESTMENT.—No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale; nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

(2) STOCK FOR STOCK OF SAME CORPORATION.—No gain or loss shall be recognized if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(3) STOCK FOR STOCK ON REORGANIZATION.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) SAME—GAIN OF CORPORATION.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) TRANSFER TO CORPORATION CONTROLLED BY TRANSFEROR.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more

persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(c) Gain from exchanges not solely in kind.—

(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(d) Same—gain of corporation.—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of

such other property so received, which is not so distributed.

(e) Loss from exchanges not solely in kind.—If an exchange would be within the provisions of subsection (b) (1) to (5), inclusive, of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

(f) Involuntary conversions.—If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended.

(g) Distribution of stock on reorganization.—If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

(h) Same—effect on future distributions.—The distribution, in pursuance of a plan of reorganization, by or on behalf of a corporation a party to the reorganization, of its stock or securities or stock or securities in a corporation a party to the reorganization, shall not be considered a distribution of earnings or profits within the meaning of section 115(b) for the purpose of determining the taxability of subsequent distributions by the corporation.

(i) **Definition of reorganization.**—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) **Definition of control.**—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

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Sec. 113. Basis for Determining Gain or Loss.

(a) **Property acquired after February 28, 1913.**—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

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(7) TRANSFERS TO CORPORATION WHERE CONTROL OF PROPERTY REMAINS IN SAME PERSONS.—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 80 per centum or more remained in the same persons or any of them, then the basis shall be

the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer; * * *

INCOME TAX REGULATIONS 74 (1928 ACT).

ART. 574. **Exchanges in connection with corporate reorganizations.**—The Act provides that no gain or loss shall be recognized if, in pursuance of a plan of reorganization, stock or securities in a corporation a party to a reorganization are exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization, or if, in pursuance of a reorganization plan, a corporation a party to a reorganization exchanges property solely for stock or securities in another corporation a party to the reorganization. If two or more corporations reorganize, for example, by—

(1) The merger of the X Corporation into the Y Corporation.

(2) The consolidation of the X Corporation and the Z Corporation into the Y Corporation, a new corporation,

(3) The acquisition by the Y Corporation of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of the X Corporation or of substantially all of the properties of the X Corporation, or

(4) The transfer by the X Corporation of a part of its assets to the Y Corporation where immediately after the transfer the X Corporation or its shareholders or both are in control of the Y Corporation—

then no taxable income is received from the transaction by the X Corporation or the Z Corporation if the sole consideration received by the corporations is stock or securities of the Y Corporation; and no taxable income is received from the transaction by the shareholders of either the X

Corporation or the Z Corporation if the sole consideration received by the shareholders is stock or securities of the Y Corporation.

If a reorganization is accomplished by the transfer by the X Corporation of a part of its assets to the Y Corporation in exchange for the stock of the Y Corporation and the X Corporation distributes to its shareholders the stock of the Y Corporation no gain to the shareholders from the receipt of such stock is recognized. (See article 576.)

Provision is made in the Act for cases in which gain to the shareholders is recognized, in connection with a reorganization, through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See article 575.)

Records in substantial form showing the basis of the stock or property exchanged and the amount of property or money received in exchange, must be kept to enable the determination of gain or loss from a subsequent disposition of the stock or property received in exchange.

Art. 575. **Exchanges in reorganizations for stock or securities and other property or money.**—If stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged for stock or securities in such corporation or in another corporation a party to the reorganization and other property or money, the gain, if any, to the recipient will be recognized in an amount not in excess of the sum of the money and the fair market value of the other property. No loss from such an exchange will be recognized. (See section 112 (e).) If a distribution of property or money in the course of a reorganization is otherwise within the provisions of this paragraph, but has the effect of the distribution of a taxable dividend, there shall be taxed to each distributee (1) as a dividend, such an amount of the gain recognized under this paragraph as is not in excess of the distributee's ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913, and (2) as a gain from the exchange of property, the remainder of the gain recognized under this paragraph.

Example (1): A, in connection with a reorganization, exchanges in 1928 a share of stock in the X Corporation, purchased in 1921 for $100, for (*a*) a share of stock in the Y Corporation, a party to the reorganization, which has a

fair market value of $90, and (*b*) $20 cash. The gain from the transaction, $10, is recognized and taxed to A. See article 597 for the basis for determining gain or loss from a subsequent sale.

Example (*2*): The X Corporation has a capital of $100,000 and earnings and profits of $50,000 accumulated since February 28, 1913. The X Corporation in 1928 transfers all its assets to the Y Corporation in exchange for the issuance of all of the stock of the Y Corporation and the payment of $50,000 in cash to the shareholders of the X Corporation. A, who owns one share of stock in the X Corporation, for which he paid $100, receives a share of stock in the Y Corporation worth $100 and in addition $50 in cash. A will be liable to the surtax on $50.

If, in pursuance of a plan of reorganization, property is exchanged by a corporation a party to a reorganization for stock or securities in another corporation a party to the reorganization and other property or money, then, if the other property or money received by the corporation is distributed by it pursuant to the plan of reorganization, no gain to the corporation will be recognized. If the other property or money received by the corporation is not distributed by it pursuant to the plan of reorganization, the gain, if any, to the corporation from the exchange will be recognized in an amount not in excess of the sum of the money and the fair market value of the other property so received which is not distributed. In either case no loss from the exchange will be recognized. (See section 112 (c).)

ART. 576. **Receipt of stock or securities in reorganization.**—If, without any surrender of his stock or securities, a shareholder in a corporation a party to a reorganization receives in pursuance of the plan of reorganization stock or securities in such corporation or in another corporation a party to the reorganization, no gain to the shareholder will be recognized.

ART. 577. **Definitions.**—The term "reorganization," as used in sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

A person is, or two or more persons are, "in control" of a corporation, within the meaning of section 112, when owning—

(1) At least 80 per cent of the voting stock, and

(2) At least 80 per cent of the total number of shares of all other classes of stock of the corporation.

As used in section 112, as well as in other provisions of the Act, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of article 574 are complied with if "stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.